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July 21, 1989

Mr. John Kelly, Chief
Superfund Program Management Branch
U.S. Environmental Protection Agency,
Region 5
230 South Dearborn Street
Chicago, Illinois 60604

Re: Fields Brook, Superfund Site No. 46
Attention: 5HSM-12

Dear Mr. Kelly:

On behalf of Cabot Corporation I respond to your letter of June 20, 1989 to my attention. Your letter states that EPA has incurred response costs of $969,282.49 in connection with the Site and further, that EPA "believes" that Cabot is liable for the "whole amount." Your letter gives no reason for this belief but continues to demand "restitution of this amount" from Cabot. Finally, you state that "an allocation . . . to apportion costs" should be worked out among the thirty-two recipients of your letter.

Contrary to your allegations, there is no evidence that Cabot is subject to liability under Section 107 of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9607. Cabot has not owned or operated any plants or facilities along Fields Brook since 1972. Moreover, the evidence of record does not indicate that Cabot discharged any hazardous substances into Fields Brook that are now found in surface water or sediment at this site.

In addition, your letter wrongly suggests that the PRPs at this site are subject to joint and several liability for the response costs incurred by EPA. The evidence of record indicates, however, that the contamination at this site is concentrated in specific geographic areas adjacent to specific plants. Since this is not a situation in which the harm is

"indivisible," the principles of joint and several liability do not apply, and any response costs that are incurred must be allocated to the individual PRPs responsible for the specific contaminants found in specific areas of the Brook. See United States v. Chem-Dyne Corp., 572 F. Supp. 802, 811 (S.D. Ohio 1983) (if the harm is divisible and if there is a reasonable basis for apportionment of damages, "each defendant [shall] be liable for the portion of harm he himself caused"); see also United States v. Northernaire Plating Co., 670 F. Supp. 742, 748 (W.D. Mich 1987), citing United States v. A&F Materials Co., 578 F. Supp. 1249 (S.D. Ill. 1984).

For these reasons, Cabot denies that it is liable to EPA or anyone else for any response costs incurred at this site, let alone for the "whole amount" spent by EPA. Cabot also reserves the right to challenge all allegations made in your letter and to challenge the specific expenditures made by EPA to date. In the interest of avoiding unnecessary litigation, however, Cabot is at this time willing to contribute a pro rata share of EPA's past costs. Accordingly, Cabot intends to mail to the designated recipient in your letter a check for one thirty-second of the $969,282.49 of alleged response costs, i.e., $30,290.08.

At the present time, Cabot is also willing to assist, at an appropriate level and on a provisional basis, in the remediation effort at this Site. To date, however, the company has been prevented from doing so by the six PRPs that have agreed to do the work specified by EPA's March 22, 1989 Section 106 order. These six PRPs have insisted upon a grossly unfair cost allocation scheme as a condition of Cabot's assisting in the remediation or further investigation at this Site. Their allocation scheme takes no account of the mobility, toxicity, source, or cost of remediating the various types of contamination found in specific segments of the Brook. Their allocation scheme also disregards the fact that Cabot operated its facilities for only a limited period of time, but many other companies operated for a much longer period. Their proposed PRP agreement provides no mechanism for modifying the percentage shares assigned to individual companies based on new information that becomes available on the sources of the contamination in the Brook or on past discharges by specific companies. Although the allocation scheme is in direct conflict with the principles of CERCLA (see

42 U.S.C. §§ 9613(f), 9622(e)(3)),[1] EPA has refused to take any step to ameliorate this situation or modify its Section 106 order to make clear that no fixed allocation need be agreed to before a willing PRP can assist in paying for necessary remedial work.

Cabot is, of course, willing to continue negotiating with EPA and the other PRPs. In the meantime, however, Cabot has no choice but to tender a check in the amount of its per capita share of the $969,282.49 mentioned in your letter.

Sincerely,

Stephen M. Truitt
Attorney for Cabot Corporation

cc: Victor Hyatt
M. Berman, Esq.

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1. See also United States v. Hardage, 116 F.R.D. 460, 465-466 (W.D. Okla. 1987); United States v. Stringfellow, 661 F. Supp. 1053, 1060 (C.D. Cal. 1987).